(18)

No. 95-860

In The

Supreme Court of the United States

October Term, 1995

BARBARA SMILEY,

Petitioner,

v.

CITIBANK (SOUTH DAKOTA), N.A.,

Respondent.

On Writ Of Certiorari To The California Supreme Court

BRIEF OF GREENWOOD TRUST COMPANY AND THE CHASE MANHATTAN BANK (USA) AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Greenwood Trust Company ("Greenwood") and The Chase Manhattan Bank (USA) ("Chase") submit this brief as *amici curiae* in support of the position of Respondent Citibank (South Dakota), N.A. ("Citibank") that the judgment of the California Supreme Court should be affirmed.[1]

Greenwood and Chase are federally-insured state banks that each issue tens of millions of credit cards to customers in all fifty states. As federally-insured state banks, Greenwood and Chase derive their federal lending authority from Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDA"), 12 U.S.C. § 1831d, which has been codified as Section 27 of the Federal Deposit Insurance Act. Congress incorporated into Section 521 of DIDA the same language long used in Section 85 of the National Bank Act for the specific purpose of conferring upon federally-insured state banks the same lending authority enjoyed by national banks under Section 85. *See Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 826-827 (1st Cir. 1992), *cert. denied*, 113 S.Ct. 974 (1993). Since Section 521 of DIDA has uniformly been construed *in pari materia* with Section 85 of the National Bank Act, this Court's construction of Section 85 in this case is vitally important to Greenwood and Chase, as well as all other federally-insured state banks.

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[1] Pursuant to Court Rule 37.3, this brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk's Office.

Moreover, both Greenwood and Chase are involved in a number of class action lawsuits around the country that challenge their assessment of credit card late charges, including several cases now pending in this Court. *Greenwood Trust Co. v. Hunter*, No. 95-963 (petition for certiorari filed Dec. 18, 1995); *Stoorman v. Greenwood Trust Co.*, No. 95-1500 (petition for certiorari filed March 18, 1996); *Harris v. Chase Manhattan Bank*, No. 95-951 (petition for certiorari filed Dec. 18, 1995). Also, the Court's construction of Section 85 will have a direct effect upon Chase, since it was a national bank prior to June, 1990 and the aforementioned cases brought against it seek relief for conduct that occurred during the time period when it was a national bank.

As pointed out in Citibank's brief, national banks have long exported credit card late charges permitted by the laws of their home States in reliance upon the consistent position of the Comptroller of the Currency ("OCC") that late charges are "interest" for purposes of Section 85. Likewise, Greenwood, Chase, and other federally-insured state banks have exported late charges permitted by the laws of their home States in reliance upon the view of the Federal Deposit Insurance Corporation ("FDIC") that late charges are "interest" under Section 521 of DIDA. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992). Therefore, adoption of petitioner's argument that late charges should not be considered "interest" would wreak havoc not only on national banks, but on state banks as well and would expose the entire banking industry to potentially enormous damage claims.

SUMMARY OF ARGUMENT

As demonstrated in Citibank's brief, the California Supreme Court's decision holding that late charges are "interest" under Section 85 comports with the language and purposes of the statute, the established meaning of "interest" at the time the National Bank Act was enacted, as well as numerous judicial precedents and OCC opinions construing Section 85. The arguments made by Citibank on these issues are supported by Greenwood and Chase and will not be reiterated herein.

Greenwood and Chase are federally-insured state banks governed by Section 521 of DIDA, which was expressly modeled on Section 85. Courts and the FDIC have held that Section 521 should be construed in the same manner as Section 85, and just as late charges are "interest" under Section 85, so too are they "interest" under Section 521. Moreover, as shown below, the amendments to Section 511 and Section 522 of DIDA demonstrate that Congress understood the term "interest" to encompass all loan related charges. Petitioner and her amici have relied on the legislative history of Section 501 of DIDA, but the California Supreme Court, First Circuit Court of Appeals and FDIC have all properly concluded that this legislative history has absolutely no relevance to the meaning of "interest" in either Section 85 or Section 521. *Smiley v. Citibank*, 11 Cal. 4th at 159 and n. 14; *Greenwood Trust Co. v. Massachusetts*, 971 F.2d at 830 n. 10; FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

The California Supreme Court correctly interpreted the meaning of "interest" in Section 85, and therefore its judgment should be affirmed.

ARGUMENT

I. Courts and Federal Banking Agencies Have Held that Late Charges Are "Interest" Under Sections 521-523 of DIDA, Which Were Modeled on Section 85

As acknowledged in petitioner's brief (p. 44), Section 85 served as the model for Section 521 of DIDA when the latter statute was enacted in 1980. Section 521, like its progenitor, provides that federally-insured state banks may "take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where such State bank . . . is located *or at the rate allowed by the laws of the State, territory, or district where the bank is located*, whichever may be greater." 12 U.S.C. § 1831d(a) (emphasis added). Moreover, the remedy provisions in Section 521(b) of DIDA are virtually identical to those contained in 12 U.S.C. § 86.

Also, at the same time that Congress enacted Section 521 of DIDA, it enacted identical provisions governing federally insured savings and loan institutions (Section 522 of DIDA, 94 Stat. 165, 12 U.S.C. § 1463(g)) and federally insured credit unions (Section 523 of DIDA, 94 Stat. 166, 12 U.S.C. § 1785(g)). Like Section 521, these provisions

incorporated the same language previously used in Section 85.[2]

The purpose of Sections 521-523 of DIDA was to place federally-insured state banks, savings and loans, and credit unions in a position of competitive equality with national banks, which historically had been statutorily favored with respect to usury authority. Indeed, the preamble of Section 521 expressly states that it was enacted "[i]n order to prevent discrimination against State-chartered insured depository institutions . . . " 12 U.S.C. § 1831d(a). After setting forth a comprehensive review of the legislative history of Section 521, the First Circuit properly concluded in *Greenwood Trust Co. v. Massachusetts* that "Congress tried to level the playing field between federally chartered and state-chartered banks when it enacted DIDA," and "the language borrowed from Bank Act § 85 and incorporated into DIDA § 521 achieves parity between national banks and their state-chartered counterparts . . . " 971 F.2d at 826, 827.

Given the incorporation of the Section 85 language into Sections 521-523 of DIDA and the clearly expressed intent of Congress to bestow upon all federally-insured depository institutions the same federal usury authority

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[2] As correctly stated by the California Supreme Court in the decision below, the borrowed language from Section 85 acts "as a choice-of-law provision, fixing the law of the national bank's home state relative to interest rates as the rule governing all loans, even interstate loans, notwithstanding the law of any other state. Section 85 thereby entrusts the question of the lawfulness of a national bank's interest rates to its home state and to its home state alone." 11 Cal. 4th at 149.

previously enjoyed solely by national banks, courts uniformly have held that Sections 521-523 should be construed *in pari materia* with Section 85. *See, e.g., Greenwood Trust Co. v. Massachusetts*, 971 F.2d at 826-828; *Gavey Properties/762 v. First Financial Savings and Loan Ass'n*, 845 F.2d 519, 521 (5th Cir. 1988); *Vanderweyst v. First State Bank of Benson*, 425 N.W.2d 803, 805-807 (Minn.), *cert. denied*, 488 U.S. 943 (1988); *Stoorman v. Greenwood Trust Co.*, 908 P.2d 133, 135 (Colo. 1995), *petition for cert. pending*, No. 95-1500 (filed March 18, 1996); *Harris v. Chase Manhattan Bank, N.A.*, 30 Cal. App.4th 130, 35 Cal. Rptr.2d 733, *review granted*, 38 Cal. Rptr.2d 346, 889 P.2d 540, *review dismissed*, 46 Cal. Rptr.2d 748, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (filed Dec. 18, 1995).

Likewise, the FDIC has concluded ever since the enactment of Section 521 that it should be interpreted in exactly the same manner as Section 85. FDIC Op. No. 81-3, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,006 (Feb. 2, 1981); FDIC Op. No. 81-7, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,008 (March 17, 1981); FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992); FDIC Op. No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,635 (July 12, 1993).

In *Greenwood Trust Co. v. Massachusetts*, the First Circuit stated that federal appellate courts applying Section 85 "have had little trouble in construing the term 'interest' to encompass a variety of lender-imposed fees and financial requirements which are independent of a numerical percentage rate . . . " 971 F.2d at 829. Since Section 521 is the "lineal descendent" of Section 85, *id.* at 830 n. 10, the court concluded that the preemptive scope

of Section 521, like that of Section 85, extends "well beyond periodic percentage rates." *Id.* at 830.

The First Circuit correctly recognized in *Greenwood Trust* that a late charge fits comfortably within the definition of "interest" set forth by this Court in *Brown v. Hiatts*, 82 U.S. (15 Wall.) 177, 185 (1872): "Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention." The First Circuit explained that "[s]uggesting that an additional fee attached to a delinquent, defaulted account is related to the creditor's cost of lending that money does no violence to language, to precedent, or, indeed, to logic." 971 F.2d at 825.[3] The Colorado Supreme Court also has held that late charges are "interest" under Section 521 of DIDA, as has the California Court of Appeal. *Stoorman v. Greenwood Trust, supra*, 908 P.2d 133; *Harris v. Chase Manhattan Bank, supra*, 30 Cal.App.4th 130. *Cf. Hunter v. Greenwood Trust Co.*, 143 N.J. 97, 668 A.2d 1067 (1995), *petition for cert. pending*, No. 95-963 (filed Dec. 18, 1995) (holding that Section 521 does not encompass late charges).

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[3] The First Circuit unanimously reversed a trial court decision from the Fall of 1991 which had held that only periodic interest rates are "interest" under Section 521. *Greenwood Trust Co. v. Massachusetts*, 776 F.Supp. 21 (D. Mass. 1991). However, during the 10 months that elapsed between that unprecedented district court decision and the subsequent reversal by the First Circuit, the law firms for petitioner in this case filed scores of class actions against state and national banks around the country challenging their credit card late charges under various states' laws.

Citibank's brief shows that the OCC repeatedly has opined that late charges are "interest" for purposes of Section 85, and the OCC's views are entitled to deference. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S.Ct. 810, 813-814 (1995). The same conclusion has been reached by all of the other federal banking agencies with respect to the meaning of "interest" in Sections 521-523 of DIDA.

The FDIC, which regulates federally-insured state banks and has interpretive authority under the Federal Deposit Insurance Act (Section 27 of the Act codifies Section 521 of DIDA), has specifically concluded that credit card late charges are "interest" under Section 521. FDIC Op. No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992). Also, it filed briefs as *amicus curiae* in the First Circuit and Supreme Courts of Colorado, New Jersey, and Pennsylvania asserting that late charges are embraced within the ambit of Section 521.

The Office of Thrift Supervision ("OTS"), which regulates federally-insured savings institutions, has opined that credit card late charges are "interest" under Section 522 of DIDA, 12 U.S.C. § 1463(g). Letter of Karen Solomon, OTS Deputy Chief Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 (Sept. 29, 1994). The predecessor of the OTS, the Federal Home Loan Bank Board, reached the same conclusion in 1986. Letter of Harry W. Quillian, FHLBB Acting General Counsel, [1994-1995 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶82,852 at p. 62,403 (June 27, 1986). *See also* 12 C.F.R. § 571.22 (1995) (under Section 522 of DIDA, savings associations enjoy "competitive equality with national

banks," including most favored lender status). The National Credit Union Administration, which regulates credit unions, opined that credit card late charges are "interest" under Section 523 of DIDA, 12 U.S.C. § 1785(g). Letter of Richard S. Schulman, Acting Assoc. Gen. Counsel, NCUA, 62 Banking Rep. (BNA) 766 (April 11, 1994). *See also* 46 Fed. Reg. 24,153 (1981) (under Section 523 of DIDA, credit unions enjoy most favored lender status).

Federally-insured depository institutions justifiably look to the opinions and interpretations of the federal banking statutes by the federal banking agencies that govern them. Billions of dollars in loan transactions have been conducted annually in reliance upon those banking agency interpretations, and therefore it is especially important that deference be accorded to them. *See, e.g.*, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978) ("In light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.' "). Substantial deference is particularly appropriate since the same statutory interpretation has been reached by five different agencies. *See Clarkson Constr. Co. v. OSHA*, 531 F.2d 451, 457 (10th Cir. 1976) (when "two [or more] administrative bodies having expertise arrive at similar interpretations, a court should be slow to impose its own interpretation").

II. Post-DIDA Legislation Supports the Conclusion That Late Charges Are "Interest"

A. Section 511 of DIDA

Petitioner's brief (p. 41 n.20) points to a temporary amendment of Section 85 and the Federal Deposit Insurance Act in 1974 that allowed national banks and other lenders to charge interest on certain business and agricultural loans at a rate of 5% above the federal discount rate where the bank was located. Pub.L. No. 93-501, §§ 201-206, 88 Stat. 1557, 1558-60 (1974). This statutory provision served as the antecedent for Section 511 of DIDA, a now-sunsetted provision that related to business or agricultural loans of $25,000 or more and was codified as 12 U.S.C. § 86a. Pub.L. No. 96-221, § 511, 94 Stat. 132, 164 (1980).

Petitioner's brief neglects to mention that only six months after DIDA's enactment, Congress amended Section 511 by adding a provision stating that *"the term 'interest' includes any compensation, however denominated, for a loan."* Pub.L. No. 96-399, § 324(b)(2), 94 Stat. 1614, 1648 (1980) (emphasis added). Senator Proxmire, the sponsor of the legislation and Chairman of the Senate Banking Committee, emphasized that it was simply "a technical clarifying amendment making no substantive changes in the usury preemption provisions." 126 Cong. Rec. S16,112 (1980). This expansive definition of "interest" in Section 86a clearly encompasses late charges.

B. Section 522 of DIDA

As discussed above, Congress incorporated the language of Section 85 into Sections 521-523 of DIDA in 1980. Congress re-codified Section 522 in 1989 as part of the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"). Pub.L. No. 101-73, § 301, 103 Stat. 183, 282 (1989). The House Report on FIRREA made it plain that the preemptive scope of Sections 521-523 of DIDA is *not* confined to percentage-based interest rates, but includes other fees and charges as well:

> [The rate authorized by Section 522 of DIDA] may be employed notwithstanding any State constitution or statute concerning *loan related charges*, which is thus preempted. *The effect of this section is to preserve the current preemption of state usury laws.* (emphasis added)

H.R. Rep. No. 54 at 343, 101st Cong., 1st Sess., pt. 1 (1989). Since Section 522 was modeled on Section 85, it is clear that Congress reads the term "interest" in both statutes broadly to encompass all "loan related charges."

Moreover, it bears emphasis that Congress has amended Section 521 twice in the past nine years. Pub.L. No. 100-86, § 101(g)(2), 101 Stat. 552, 563 (1987); Pub.L. No. 101-73, § 201(a)(1), 103 Stat. 183, 187 (1989). During this time, Congress undoubtedly was well aware of the widespread practice of exporting late charges and the many judicial and administrative agency opinions holding that the term "interest" in Sections 521-523 of DIDA and Section 85 of the National Bank Act embraces flat late charges and other charges. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Board of Governors of Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 248

(1978). Had Congress intended a more restrictive construction of the term "interest" in those statutes than the courts and agencies had adopted, it could have amended them to narrow their preemptive scope, but it has not done so.

C. Riegle-Neal

Section 85 of the National Bank Act and Section 521 of DIDA were both addressed in the recently-enacted Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994. Pub.L. No. 103-328, 108 Stat. 2338 (1994). In the Riegle-Neal Act, Congress included a "savings" provision that expressly preserves the pre-existing authority of banks to collect all lending charges in accordance with home state law. Section 111(3) of the Act provides that "[n]o provisions of this title and no amendment made by this title to any other provision of law shall be construed as affecting in any way . . . the applicability of section 5197 of the Revised Statutes [Section 85 of the National Bank Act] or section 27 of the Federal Deposit Insurance Act [Section 521 of DIDA]." 108 Stat. at 2365. The Conference Report accompanying H.R. 3841 (the Bill enacted into law), explained that, "[t]he amendments made by the [Act] that authorize insured depository institutions to branch interstate *do not affect existing authorities* with respect to any charges under [Section 85 or Section 521] imposed by national or state banks for loans or other extensions of credit made to borrowers outside the state where the bank or branch making the loan or other extension of credit is located." H.R. Conf. Rep. No. 651 at 63, 103d Cong., 2d Sess. (1994) (emphasis supplied). As

demonstrated in Citibank's brief, the "existing authorities" that preceded this Conference Report had long held that the preemptive scope of Sections 85 and 521 is *not* confined to percentage-based interest rates.[4] Thus, the Conference Report confirms Congress' agreement with the long line of judicial and administrative authorities holding that late charges are "interest" under Sections 85 and 521.

III. The Legislative History of Section 501 of DIDA is Irrelevant

The briefs filed by petitioner (pp. 42-43) and her amici rely on the legislative history of Section 501 of DIDA, which amended the National Housing Act and is codified as 12 U.S.C. § 1735f-7a(a)(1). In particular, petitioner points to a passage in a Senate Banking Committee Report suggesting that late charges are outside the preemptive scope of Section 501 of DIDA. However, the language of that statute expressly provides for preemption of state laws "limiting the rate or amount of interest, discount points, finance charges, or *other charges* which may be charged, taken, received, or reserved" in connection with first-lien mortgage loans. Thus, the statute by its terms provides for preemption of "other charges," which is sufficiently broad to embrace late charges. This

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[4] Indeed, the First Circuit decision in *Greenwood Trust v. Massachusetts* holding that credit card late charges are "interest" under Section 521 preceded this Conference Report, as did a number of other judicial and administrative agency opinions reaching the same conclusion.

plain statutory language is controlling over the Committee Report cited by petitioner. *See, e.g., West Virginia Univ. Hospitals, Inc. v. Casey,* 499 U.S. 83, 98-99 (1991) ("The best evidence of [Congressional] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous . . . we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.")

As noted in Citibank's brief, Section 501 of DIDA was enacted 116 years after enactment of Section 85, and thus its legislative history cannot possibly shed any light on the intended meaning of "interest" in Section 85. *See, e.g., Central Bank of Denver v. First Interstate Bank,* 114 S.Ct. 1439, 1452 (1994) (rejecting parties' reliance on legislative developments in the 1980's to ascertain Congressional intent when it enacted Securities Exchange Act of 1934). Thus, the California Supreme Court correctly held that the legislative history of Section 501 was irrelevant to the construction of Section 85. 11 Cal.4th at 159-160 and n. 14.

Not only is the legislative history of Section 501 irrelevant to the meaning of "interest" in Section 85, it has also repeatedly been found irrelevant to the meaning of "interest" in Section 521. *Greenwood Trust v. Massachusetts,* 971 F.2d at 830 n. 10; *Hill v. Chemical Bank,* 799 F.Supp. 948, 954 (D. Minn. 1992); *Harris v. Chase Manhattan Bank,* 34 Cal. App.4th at 1573-1574; FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992).

The legislative history of Section 501 has no bearing on the construction of Section 521 for a number of reasons: (a) Section 501 applies only to first-lien residential mortgage loans, while Section 521 applies to any type of loan; (b) Section 501 governs a variety of lenders, including non-depository institutions, while Section 521 applies only to federally-insured state banks; (c) Sections 501 and 521 originated in different bills at different times[5] and had vastly different purposes; (d) Sections 501 and 521 have materially different preemption provisions; (e) Section 501 amended the National Housing Act, while Section 521 amended the Federal Deposit Insurance Act; (f) DIDA was a hodgepodge of diverse and unrelated provisions affecting a wide variety of financial institutions; and (g) there is no evidence that Congress intended "interest" to have a single meaning throughout all of Title V of DIDA (Sections 501-529).[6]

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[5] The Senate Banking Committee Report concerning Section 501 of DIDA quoted by petitioner was issued on October 15, 1979, several weeks before the introduction of the bill (S. 1988) that became Section 521 and two months before the Senate Banking Committee hearings on that bill. Moreover, the statement in the Committee Report that late charges are outside the preemptive scope of Section 501 of DIDA, coupled with "[t]he absence of a comparable comment limiting the preemptive scope of § 521 arguably indicates that Congress intended that, absent limiting language, the term 'interest' be interpreted to include more than the numerical periodic interest rate, as is the case under § 85 of the National Bank Act." *Hill v. Chemical Bank,* 799 F.Supp. 948, 954 (D. Minn. 1992).

[6] There is nothing in the legislative history of Sections 521-523 which shows that Congress intended to exclude late charges from the preemption afforded thereunder. Moreover, neither Section 501 nor the excerpt from the Banking Committee

Also, Section 528 of DIDA explicitly provides that in instances in which Section 501 of DIDA and either Section 85 of the National Bank Act or Section 521 apply with respect to the same mortgage loan, the bank may charge whatever is allowed by *either* applicable statute. Pub.L. No. 96-221, § 528, 94 Stat. 132, 168 (1980).

In light of the foregoing, the First Circuit correctly held that the legislative history of Section 501 of DIDA has no bearing whatsoever on the meaning of "interest" in Section 521:

> The mere fact that both of these sections fell under the broad umbrella of DIDA does not make them fair congeners. Since DIDA contains an amalgam of different provisions, the legislative history and purpose of one section of DIDA does not necessarily inform the interpretation of all other parts of that law. . . . In light of the irrefutable evidence that section 521 was conceived as an offspring of section 85 of the Bank Act, we believe that the district court's reliance upon a comparison between it and DIDA § 501

Report relating thereto even purports to define the term "interest" for purposes of Section 501, much less for all of the myriad other provisions of DIDA.

Section 501(e) defines various terms (other than "interest"), but explicitly states that those definitions apply only "[f]or the purpose of this *section*." 94 Stat. 163 (emphasis added). The only term which Congress defined for purposes of all of the provisions in Title V of DIDA (Sections 501-529) was "State," which was defined in Section 527 "[f]or purposes of this *title*." 94 Stat. 168 (emphasis added). Section 527 clearly shows that when Congress intended a term to have a single meaning throughout Sections 501-529, it certainly knew how to express that intent.

> was misplaced. The proper analogy in this case is to compare lineal descendants who share common language and purpose, not distant cousins who share little more than a name.

971 F.2d at 830 n. 10. *Accord* FDIC Opinion No. 92-47, [1992-1993 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,534 (July 8, 1992). It therefore follows that since Section 501 is irrelevant to the construction of Section 521, it is irrelevant to the interpretation of Section 85, which was enacted more than a century earlier.

IV. Section 85 of the National Bank Act and Section 521 of DIDA Preempt The Common Law

Petitioner's argument that neither Section 85 nor Section 521 preempt the common law (Pet. Br. at pp. 43-44) is wholly without merit. *All* forms of state law limitations in the borrower's State on the interest charged by out-of-state federally-insured depository institutions, whether statutory in nature or based on the common law, are preempted by Section 85 and Section 521.

It has been well-settled law for more than a century, since this Court's decision in *Carter v. Carusi*, 112 U.S. 478 (1884), that Section 85 preempts common law. In *Carter*, the Court held that Section 86 is "the exclusive remedy" for the imposition of excessive interest by a national bank, and it rejected plaintiff's argument that he had a "common-law right to reclaim or set off usurious interest paid. . . . " *Id.* at 483. Neither petitioner nor her amici have been able to cite *any* case rendered in the 132 years that have elapsed since the enactment of Section 85 in 1864 that holds it does not preempt common law. Indeed,

common law challenges to credit card late charges imposed by national banks have been repeatedly rejected by the courts. As stated in a recent opinion letter issued by the FDIC:

> *It is clear that Section 85 preempts all contrary state law (including, without limitation, state common law).* That proposition has not, to our knowledge, been seriously questioned. The substantive language of Section 85, the exclusive remedy for challenging interest charged by a national bank in 12 U.S.C. § 86, and the ease with which Section 85 could be circumvented if it did not preempt state common law all compel the conclusion that Section 85 displaces all contrary state law. (emphasis added).

FDIC Opinion No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,635 at 55,840 n. 4 (July 12, 1993).[7]

Adoption of petitioner's argument that Section 85 and Section 521 do not preempt common law would totally eviscerate the statutory authorization to charge interest at the rate allowed by the laws of the State where the bank is located. For example, even though petitioner and her amici concede that, under *Marquette National*

[7] A similar conclusion was reached by the National Credit Union Administration: "It is our understanding that Section 85 already preempts all state law limitations, including common law limits, in the borrower's state of residence on the interest which may be charged by out-of-state national banks. . . . *We are unaware of any case or other authority which holds that common law is not preempted by Section 85.*" Letter from Richard S. Schulman, Acting Associate General Counsel, NCUA, Vol. 62 No. 17 BNA Banking Report (Apr. 11, 1994), at 767 (emphasis added).

Bank v. First of Omaha Service Corp., 439 U.S. 299 (1978), state statutes purporting to limit percentage-based periodic interest rates (the "finance charge") are preempted, their theory would allow cardmembers to challenge finance charges under the varying common laws of all 50 states (such as by asserting that finance charges are unconscionable, or constitute an illegal "penalty" or unjust enrichment). Indeed, under petitioner's theory, the Commonwealth of Massachusetts, having failed in its efforts to apply a statute prohibiting late charges against Greenwood, could accomplish the same objective simply by commencing a new suit against Greenwood based on Massachusetts common law.

As the National Credit Union Administration has reasoned, "Congress did not intend the peculiar and illogical result that states would be precluded from directly restricting, by state constitution or statute, the interest charged by out-of-state federally insured depository institutions, but nonetheless would be free to impose such restrictions indirectly through the common law. As a practical matter, such a result would vitiate the preemption of state law intended by Congress. . . . " NCUA Opinion Letter, *supra*. *Accord Harris v. Chase Manhattan Bank*, 34 Cal. App.4th at 1574 ("an enormous loophole in the statute" would be created if states were allowed to limit the interest charged by out-of-state lenders "through the back door of the common law").

Section 86 of the National Bank Act and Section 521(b) of DIDA create an exclusive federal remedy for interest overcharges by national banks and state banks, respectively. *McCollum v. Hamilton Nat'l Bank*, 303 U.S. 245, 248 (1938); *Evans v. National Bank of Savannah*, 251

U.S. 108, 109, 114 (1919); *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34-35 (1875); *M. Nahas & Co. v. First Nat'l Bank*, 930 F.2d 608, 610 (8th Cir. 1991). As the FDIC has reasoned, the presence of these exclusive federal remedial provisions is wholly inconsistent with the notion that borrowers can seek relief under state common law theories. FDIC Op. No. 93-27, [1993-1994 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶81,635 at 55,841 (July 12, 1993).[8]

V. The Construction of "Interest" In Sections 85 and 521 Has Far-Reaching Consequences

The potential economic consequences of adopting petitioner's constricted interpretation of "interest" are

[8] Also, the California Court of Appeal and FDIC have emphasized that, unlike numerous federal statutes that contain "savings" clauses explicitly preserving state common law from preemption, the federal banking statutes contain no such clause. *Harris v. Chase Manhattan Bank*, 34 Cal.App.4th at 1574; FDIC Opinion No. 93-27, *supra*. When Congress intends to "save" common law claims from preemption, it knows how to do so. *See, e.g.*, 15 U.S.C. § 1397(k) (1988) ("Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."); 15 U.S.C. § 4406(c) (1988) ("Nothing in this chapter shall relieve any person from liability at common law . . . "); 17 U.S.C. § 301(b) (1988 & Supp. V 1993) ("Nothing in this title annuls or limits any rights or remedies under the common law . . . "); 29 U.S.C. § 653(b)(4) (1988) ("Nothing in this chapter shall be construed to . . . diminish or affect in any other manner the common law . . . "); 49 U.S.C. app. § 1506 (1988) ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law . . . ").

staggering. According to the most recently available statistics, in 1994 alone the credit card industry received approximately $2 billion in revenues from late fees and other similar fees. Credit Card Management, *Card Industry Directory: The Blue Book of the Credit and Debit Card Industry in the United States*, 1996 ed. at p. 18. The numerous class actions currently pending throughout the country against federally-insured depository institutions that were precipitated by the later-reversed District Court opinion in *Greenwood Trust v. Massachusetts* seek treble damages under various state consumer protection laws, which typically have statutes of limitation that permit suit for several years of transactions. These lawsuits, along with the plethora of new class actions that certainly will be filed if the California Supreme Court decision below is reversed, may pose a threat to the safety and soundness of many of the country's financial institutions. Indeed, in an *amicus curiae* brief the FDIC filed in the First Circuit in the *Greenwood Trust v. Massachusetts* case, the agency cautioned that the credit card late charge class actions could "jeopardize the financial integrity of all FDIC-insured institutions."

In addition, it bears emphasis that this Court's construction of "interest" in the federal banking statutes affects not only credit card lending, but all types of lending. For example, under the petitioner's reasoning, a flat origination fee for a loan might no longer be considered "interest" as a matter of federal law. Also, many states allow flat minimum finance charges on open-end credit, and even though such finance charges clearly constitute "interest," they may not qualify as "interest" under federal banking law if the petitioner's definition of

"interest" is adopted. Similarly, late charges imposed in connection with home equity, automobile, and commercial loans would not be "interest" either.

An unduly narrow definition of "interest" would have a dramatic effect not only on interstate lending, but intrastate lending as well. Federally-insured depository institutions have long relied on the most favored lender doctrine in order to "borrow" the more favorable lending authority often bestowed upon other lenders (*e.g.*, credit unions, consumer finance companies, and second mortgage loan companies) located in the same State. Restricting the definition of "interest" to percentage-based periodic interest rates will prevent federally-insured depository institutions from "borrowing" any of the flat fees allowed to competing lenders in the same State, placing them at a great competitive disadvantage.[9] Moreover, such a holding would expose federally-insured depository institutions to substantial liability for countless intrastate transactions made over the years in reliance on the most favored lender doctrine.

[9] Indeed, the New Jersey Supreme Court's recent erroneous decision holding that late charges are not "interest" under Section 85 expressly countenances a statutory scheme whereby credit unions may assess late charges, but state and national banks may not. *Sherman v. Citibank (South Dakota), N.A.*, 143 N.J. 35, 67-70, 668 A.2d 1036, 1051-1053 (1995), *petition for cert. pending*, No. 95-991 (filed Dec. 21, 1995). This is precisely the type of discrimination that this Court intended to prevent when it enunciated the most favored lender doctrine more than a century ago in *Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1874).

CONCLUSION

For the reasons set forth above and in the briefs filed by Citibank and its other amici, the judgment of the California Supreme Court should be affirmed.

Respectfully submitted,

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